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## Buyers Beware: Statutes Shield Real Estate Brokers and Sellers Who Do Not Disclose That Properties Are Psychologically Tainted

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# BUYERS BEWARE: STATUTES SHIELD REAL ESTATE BROKERS AND SELLERS WHO DO NOT DISCLOSE THAT PROPERTIES ARE PSYCHOLOGICALLY TAINTED

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## I. Introduction

Real estate sellers and their brokers were traditionally not required to disclose any information about property because the controlling doctrine was *caveat emptor*. The protection provided by that doctrine has gradually been eroded by judicial application of the theory of common law fraud,<sup>1</sup> under which sellers are required to disclose conditions that the buyer could not be expected to discover by a diligent inspection, but which the seller knows or should know would materially affect the value of the property to the buyer. That disclosure obligation has been expanded in some states to the listing broker and the selling broker.<sup>2</sup> In response, brokers have made a concerted effort to shift the burden onto sellers by enacting state statutes requiring sellers to make written disclosures about property conditions.<sup>3</sup>

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1. See Quintin Johnstone, *Major Issues In Real Property Law*, 55 MO. L. REV. 1 (1990); Robert M. Morgan, *The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It's Not Just for Sellers Anymore*, 68 FLA. B.J. 28 (Feb. 1994); Paula C. Murray, *The Real Estate Broker and the Buyer: Negligence and the Duty to Investigate*, 32 VILL. L. REV. 939 (1987); Kevin C. Culum, Comment, *Hidden-But-Discoverable Defects: Resolving the Conflicts Between Real Estate Buyers and Brokers*, 50 MONT. L. REV. 331 (1989); Richard M. Jones, Comment, *Risk Allocation and the Sale of Defective Used Housing in Ohio-Should Silence be Golden?*, 20 CAP. U. L. REV. 215 (1991);.

2. See Clarence E. Hagglund & Britton D. Weimer, *Caveat Realtor: The Broker's Liability for Negligent and Innocent Misrepresentations*, 20 REAL EST. L.J. 149 (1991). But see Robert M. Zeit, Comment, *Real Estate - Broker Liability to Purchasers - Herbert v. Saffel*, 877 F.2d 267 (4th Cir. 1989), 63 TEMP. L. REV. 165 (1990).

3. See James D. Lawlor, *Seller Beware: Burden of Disclosing Defects Shifting to Sellers*, 78

Psychological impact property statutes began to appear in the late 1980s, after the notorious *Reed v. King*<sup>4</sup> and *Stambovsky v. Ackley*<sup>5</sup> cases. In *Reed*, a home purchaser in California was not informed that the property had been the site of a multiple murder ten years earlier. The buyer, Reed, sought rescission and damages. The trial court found that the complaint failed to allege concealment of a material fact.<sup>6</sup> The court of appeal reversed, holding that the purchaser had stated a cause of action for rescission and damages based on fraud.<sup>7</sup> The court was careful not to endorse reliance on "the materiality of facts predicated peripheral, insubstantial, or fancied harms."<sup>8</sup> The critical question was, as the court put it: "[D]oes the seller have a duty to disclose . . . ?"<sup>9</sup> The court reasoned that the buyer could not reasonably be expected to anticipate the possibility that murder had occurred on the property, so she should not be charged with the duty to inquire into and discover that fact.<sup>10</sup> Consequently, the court ruled that on remand Reed would be entitled to a favorable ruling if she could show that the murders had a significant negative effect on the market value of the property.<sup>11</sup>

In *Stambovsky*, a purchaser sued for rescission of the purchase contract and damages on learning that the house he had contracted to buy had a wide-spread reputation as being haunted.<sup>12</sup> New York applied the doctrine of *caveat emptor*, so the seller had no duty to disclose conditions about the premises unless there was a confidential or fiduciary duty between the parties, or the seller had engaged in active concealment.<sup>13</sup> However, the *Stambovsky* court concluded that the seller was estopped to deny the haunting because the seller had announced it to local media and *Readers' Digest*.<sup>14</sup> The court suggested that this was merely a logical extension of the doctrine that a seller who makes a partial disclosure is obligated to make a complete and full disclosure to avoid being misleading.<sup>15</sup> Furthermore, the court stated:

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A.B.A.J. 90 (1992); Paula C. Murray, *What Constitutes A Defect in Real Property?*, 22 REAL EST. L.J. 61 (1993); Katherine A. Pancak et al., *Residential Disclosure Laws: The Further Demise of Caveat Emptor*, 24 REAL EST. L.J. 291 (1996); John H. Scheid, Jr., *Mandatory Disclosure Law: A Statute for Illinois*, 27 J. MARSHALL L. REV. 155 (1993); Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381 (1995); Alan M. Weinberger, *Let the Buyer Be Well Informed? — Doubting the Demise of Caveat Emptor*, 55 MD. L. REV. 387 (1996); Daivita S. Kasper, Note, *Ohio's Homeowner Disclosure Law*, 45 CASE W. RES. L. REV. 1149 (1995); Carolyn L. Mueller, Legislative Note, *Ohio Revised Code Section 5302.30: Real Property Transferor Disclosure - A Form Without Substance*, 19 U. DAYTON L. REV. 783 (1994).

4. 193 Cal. Rptr. 130 (Ct. App. 1983).

5. 572 N.Y.S.2d 672 (App. Div. 1991).

6. See *Reed*, 193 Cal. Rptr. at 130.

7. See *id.* at 134.

8. *Id.* at 133.

9. *Id.* at 131.

10. See *id.* at 133.

11. See *id.* at 134.

12. See *Stambovsky*, 572 N.Y.S.2d at 674.

13. See *id.* at 675.

14. See *id.*

15. See *id.* at 67 (discussing *Junius Constr. Co. v. Cohen*, 178 N.E. 672 (N.Y. 1931)).

Where a condition which has been created by the seller materially impairs the value of the contract and is particularly within the knowledge of the seller or is unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure constitutes a basis for rescission as a matter of equity.<sup>16</sup>

The court held, however, there was no cause of action against the listing broker. As the agent of the seller, the broker had no duty to disclose facts about the property to the buyer.<sup>17</sup>

The presence of ghosts or a history of murders might scare away some buyers or lower the market value to those who are willing to buy because of the smaller pool of prospective buyers for a possible resale. But hauntings or murders are not the most serious of the events that might make a property less marketable. Ownership or prior occupancy of the property by a person inflicted with AIDS or the HIV virus might have a similar effect, despite assurances by public health officials that the next occupant would not be at any risk. This might lead to the conclusion that AIDS or HIV infection is a material fact that the seller and his or her broker should disclose.<sup>18</sup>

Amendments to the Fair Housing Act in 1988 added uncertainty to disclosure obligations in real estate transactions involving prior occupants who were diagnosed with AIDS.<sup>19</sup> The amendments expanded the prohibition against discrimination in the sale, rental, or financing of dwellings to cover discrimination based on handicap. If the property of AIDS or HIV victims would significantly lose value, perhaps even becoming worthless, it would have the effect of freezing those victims out of the real estate market based upon their disease. Arguably, disclosing that information would be a violation of Fair Housing.<sup>20</sup> Real estate agents were unsure whether the amendments prohibited the unsolicited disclosure of these facts. The National Association of Realtors (NAR) requested the Department of Housing and Urban Development (HUD) to clarify the issue.<sup>21</sup> HUD responded that unsolicited disclosure of a seller's AIDS infection would violate the Fair Housing Act.<sup>22</sup> However, the ruling did not answer whether an agent could respond to a direct inquiry concerning AIDS from a potential buyer. To be safe, NAR advised its members not to respond to such inquiries.<sup>23</sup>

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16. *Id.* at 676.

17. *See id.* at 674-75.

18. *See* Michael Adam Burger & Lourdes I. Reyes Rosa, *Your Money and Your Life! AIDS and Real Estate Disclosure Statutes*, 5 HOFSTRA PROP. L.J. 349 (1993); Sharlene A. McEvoy, *Caveat Emptor Redux: "Psychologically Impacted" Property Statutes*, 18 W. ST. U. L. REV. 579 (1991); Sharlene A. McEvoy, *Stigmatized Property: What a Buyer Should Know*, 48 J. MO. BAR 57 (1992); Paula C. Murray, *Aids, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 WAKE FOREST L. REV. 689 (1992).

19. *See* 42 U.S.C. § 3604 (1994).

20. *See* Op. Att'y Gen. of Tex., No. JM-1093, at 5725 (Sept. 5, 1989).

21. *See* Annemarie Roketenetz, *Stigmatized Property: Know the Legal Boundaries*, REAL EST. TODAY, Apr. 1991, at 28.

22. *See id.*; Linn Allen, *New Rules Help Protect Realty Agents*, CHI. TRIB., July 28, 1991, at C1.

23. *See* Roketenetz, *supra* note 21, at 28. NAR recommended the following language:

In response to the uncertainty created by case law and the Fair Housing Act, twenty-nine states and the District of Columbia passed laws to provide protection for brokers and sellers involved with psychologically impacted property.<sup>24</sup> California began the trend in 1987. The NAR subsequently adopted a policy to encourage states to pass such legislation and drafted model legislation that declared psychological impacts "not material facts."<sup>25</sup> But these statutes are not a panacea. The stigmatizing events are not uniform. Some statutes are overly complex. Some statutes provide procedures that allow buyers to inquire about stigmatizing events if the buyer follows the proper procedure. Not all protect both the brokers and sellers. None makes clear whether the brokers should or can inform buyers about the existence of these shield laws, which places diligent brokers in an awkward position. This article will review and contrast the current statutes. A chart is included as an appendix to aid the reader in obtaining an overview of the law. Then, following an analysis of the statutes' unintended negative effects, a solution is proposed.

## *II. State Statutes Relating to Stigmatized Property*

Shield statutes involving stigmatized property typically have two provisions. First, they remove the duty to disclose certain psychological impacts relating to real estate transactions. Second, they prohibit a cause of action against various persons for failing to disclose certain psychological impacts. The duty to disclose is abrogated by declaring that psychological impacts enumerated in the statute are "not a material fact" that must be disclosed in a real estate transaction.<sup>26</sup> Persons protected from a cause of action may include the transferors, owners, brokers, salespersons, or other agents, lessees, and sublessees, or any other persons involved in the transaction. Delaware even prohibits a cause of action against the agent of a transferee for failing to *inquire* about psychological impacts.<sup>27</sup> Although most statutes prevent a cause of action against an owner or the owner's agent, five states<sup>28</sup> protect only real estate brokers or salespersons and do not mention the transferor. Perhaps this is because these statutes are usually located within chapters relating to licensing real estate brokers and salespeople.

Under these shield laws, property may be classified as "psychologically impacted" or the like as the result of a dramatic event occurring on the property or the disease of the property's prior occupant. The typical impacts are suicide, homicide, or other felonies, and infection of the prior occupant with Human Immunodeficien-

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It is our firm policy not to answer inquiries of this nature one way or another, since the firm feels that this information is not material to the transaction. In addition, any type of response may be a violation of fair housing laws. You will have to find out this information through other sources.

*Id.*

24. *See id.*

25. *See id.*

26. *See* CONN. GEN. STAT. § 20-329dd(a) (1995).

27. DEL. CODE ANN. tit. 24, § 2929(e).

28. Colorado, Illinois, Michigan, Montana, and Texas.

cy Virus (HIV), Acquired Immune Deficiency Syndrome (AIDS), or any other disease that is not known to be transmitted through common occupancy. Some states extend coverage to other deaths occurring on the property whether by natural or accidental causes.<sup>29</sup> Although Nevada and Texas are included in this group, they require the disclosure of a death that resulted from a condition on the property.<sup>30</sup> Still other states protect disclosure of gang activity, the manufacture or distribution of illegal substances, or the discharge of a firearm on the property.<sup>31</sup>

Despite limiting the duty to disclose psychological impacts and prohibiting causes of action, many statutes reiterate that the protections afforded sellers and agents should not be construed to allow persons to make misrepresentations of fact.<sup>32</sup> For example, an agent, when asked of the fact, cannot erroneously deny that a suicide occurred on the property.

#### A. Notable Provisions

##### 1. Arizona

In 1996, the Arizona legislature removed the language from the state's psychologically impacted property statute that limited protection of real estate agents to licensees "acting on behalf of a transferor."<sup>33</sup> Thus, transferee's agents are now protected from causes of action under the statute. The statute does not expressly limit the duty of sellers and real estate agents to disclose psychological impacts.<sup>34</sup> However, it does prevent causes of action against sellers or real estate agents for failing to disclose such occurrences.<sup>35</sup> In addition to the common elements of homicide, any other felony, or suicide, AIDS, HIV, and any other disease not transmitted through common occupancy, Arizona's statute includes natural death at the property in its list of psychological impacts. Additionally, Arizona expressly prohibits rescission of a transaction for not disclosing the psychological impacts included in the statute.<sup>36</sup>

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29. See ARIZ. REV. STAT. ANN. § 32-2156(A)(1) (Supp. 1996); Cal. Civ. Code § 1710.2(a) (West Supp. 1997); IND. CODE § 24-4.6-2.1-2(1) (1995); MD. CODE ANN., BUS. OCC. & PROF. § 17-322.1(a)(2) (Supp. 1996); NEV. REV. STAT. § 40.770(1)(a) (1995); N.M. STAT. ANN. § 47-13-2(A) (Michie 1995); N.Y. REAL PROP. LAW § 443-a(1)(b) (McKinney Supp. 1997); N.C. GEN. STAT. § 39-50 (Supp. 1995); S.C. CODE ANN. § 40-57-270(A) (Law Co-op. Supp. 1996); TEX. REV. CIV. STAT. ANN. art. 6573a, § 15E(2) (West 1996).

30. See discussion of Nevada *infra* notes 115-21 and accompanying text, and Texas *infra* notes 175-77 and accompanying text.

31. See discussion of Indiana *infra* notes 81-87 and accompanying text.

32. See discussion of Colorado *infra* notes 44-47 and accompanying text; Illinois, *infra* notes 79-80 and accompanying text; Michigan, *infra* notes 101-09 and accompanying text; Missouri, notes 110-14 and accompanying text; and Texas, *infra* 175-77 and accompanying text.

33. 1996 Ariz. Legis. Serv. 299, § 2 (West).

34. See ARIZ. REV. STAT. ANN. § 32-2156 (West Supp. 1996).

35. See *id.* § 32-2156(A).

36. See *id.* § 32-2156(B).

## 2. California

In 1986 the California legislature passed a stigmatized property statute<sup>37</sup> in response to the uncertainty created by cases such as *Reed v. King*.<sup>38</sup> In *Reed*, the California Third District Court of Appeal held that a purchaser had stated a cause of action for rescission and damages based on the failure of the seller and his real estate agent to disclose that the property was psychologically impacted.<sup>39</sup> Ten years before the sale, a mother and her four children had been murdered on the property. Under California's stigmatized property statute, owners, owners' agents, and transferees' agents are now immune from actions based on the failure to disclose psychological impacts listed in the statute. In the case of deaths, however, the statute only applies to the death of the prior occupant that occurred on the property "more than three years prior."<sup>40</sup> With the exception of Hawaii's statute concerning real estate disclosure statements,<sup>41</sup> California is the only state that distinguishes a recent death on a property from a death that occurred several years in the past.

Like many other states, California's statute clarifies that nothing in the section shall be construed to allow owners and agents to make intentional misrepresentations of fact in response to an inquiry.<sup>42</sup> Interestingly, however, the language in the subsection is only "concerning deaths on the real property."<sup>43</sup> The absence of language concerning disease of the prior occupant could be viewed by some as permission to make intentional misrepresentations concerning AIDS or HIV.

## 3. Colorado

In 1991 Colorado added a section that is not unusual to its statutes regarding psychological impacts.<sup>44</sup> The initial subsection states that circumstances relating to the property are not material facts if they could "psychologically impact or

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37. CAL. CIV. CODE § 1710.2 (West Supp. 1997).

38. 193 Cal. Rptr. 130 (Ct. App. 1983). Chapter 498, section 2 of the Statutes of California provides:

(e) The applicability of cases such as *Reed v. King*, 145 CA 3d 261, which deals with the obligation of a seller of real property to disclose facts materially affecting the value or desirability of the property, is not clear as to situations where previous owners or inhabitants of real property have been afflicted with AIDS. The Legislature intends to clarify this situation by the enactment of this act.

1986 Cal. Stat. ch. 498, § 2.

39. See *Reed*, 193 Cal. Rptr. at 130.

40. CAL. CIV. CODE § 1710.2(a) (West Supp. 1997).

41. HAW. REV. STAT. § 508D-8 (listing material facts to be omitted from real estate disclosure statements); see discussion of the Hawaii statute *infra* notes 71-78 and accompanying text.

42. See CAL. CIV. CODE § 1710.2(d) (West Supp. 1997).

43. Section 1710.2(d) provides: "Nothing in this section shall be construed to immunize an owner or his or her agent from making an intentional misrepresentation in response to a direct inquiry from a transferee or a prospective transferee of real property, concerning deaths on the real property." *Id.* (emphasis added).

44. See COLO. REV. STAT. ANN. § 38-35.5-101(i) (West Supp. 1996).

stigmatize such property."<sup>45</sup> The statute then outlines facts that could represent such impacts. The list consists of the most common factors found in other state statutes: AIDS or HIV status of the prior occupant, or any other disease that is highly unlikely to be transmitted through common occupancy; or homicide, any other felony, or a suicide, on the property. This list is not limiting, however. Thus, other circumstances relating to a piece of property in Colorado could arguably be considered "stigmatizing."

The second subsection of Colorado's statute immunizes real estate brokers and salespersons from actions based on failure to disclose the types of impacts described in the statute.<sup>46</sup> This too is similar to many other states' statutes. However, Colorado, like only a few other states,<sup>47</sup> fails to provide similar immunity for the seller.

#### 4. Connecticut

The 1990 statute<sup>48</sup> defines "psychologically impacted" by a list of possible circumstances that trigger the protection of the statute.<sup>49</sup> Section 20-329dd(a) makes such psychological impacts not a material fact subject to disclosure. Section 20-329dd(b) prevents causes of action against owners and agents for failure to disclose to the transferee that a property was psychologically impacted.

Section 20-329ee provides the detailed process by which a potential transferee may find out about psychological impacts regarding real estate.<sup>50</sup> A potential transferee making a bona fide offer may notify the seller in writing that a psychological impact is relevant to the purchase decision. The seller, through his or her agent, must respond in writing,<sup>51</sup> or in the alternative, may decide not to disclose such information.<sup>52</sup> Under this alternative, the statute directs the seller's agent to notify the buyer of the decision to remain silent, which, of course, would be a red flag to the buyer. However, the statute does not address what happens if the seller is not represented by an agent.

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45. *Id.*

46. *Id.* § 38-35.5-101(2).

47. Illinois, Michigan, Montana, and Texas.

48. 1990 Conn. Pub. Acts 141 (codified at CONN. GEN. STAT. §§ 20-329cc to -329ff).

49. See CONN. GEN. STAT. ANN. § 20-329cc (West Supp. 1996).

50. Section 20-329ee provides:

Notwithstanding sections 20-329cc and 20-329dd, if a purchaser or lessee of real estate, who was in the process of making a bona fide offer, advises an owner of real estate or his or her agent, in writing, that knowledge of a psychological impact is important to his decision to purchase or lease the property, the owner through his or her agent shall report any findings to the purchaser or lessee, in writing subject to and consistent with applicable laws of privacy. If the owner refuses to disclose such information, his or her agent shall so advise the purchaser or lessee in writing.

*Id.* § 20-329ee.

51. See *id.*

52. See *id.*



### 5. Delaware

Delaware's statute<sup>53</sup> relating to psychological impacted property seems to be the most comprehensive. The statute defines "psychological impact" with a list of circumstances including: homicide, other felony, or suicide; the AIDS or HIV status of the prior occupant; or "any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place."<sup>54</sup> Subsection 2929(d) declares that these psychological impacts are not a material fact in a real estate transaction.<sup>55</sup> Subsection 2929(e) has a typical provision providing immunity for failing to disclose psychological impacts. However, the provision is unique in that it lists many protected parties (owner, appraiser, owner's agent, and transferee's agent) and is the only statute to offer protection to parties involved for failing to *inquire* about psychological impacts.<sup>56</sup>

Like Connecticut's statute,<sup>57</sup> subsection 2929(f) of the Delaware statute outlines a detailed process for a potential transferee to inquire about psychological impacts.<sup>58</sup> With regard to these inquiries, Delaware treats the two types of psychological impacts differently. First, if a potential transferee makes a written inquiry about impacts related to deaths or crimes, the statute directs the owner or owner's agent to answer truthfully,<sup>59</sup> but the agent has no duty to inquire about these type of impacts unless the transferee has made the request. Thus, this section may be reconciled with the previous section which immunized an agent from a cause of action for failing to inquire. If the transferee makes a request, subsection (f) states that the agent has the duty to inquire; however, subsection (e) states that there shall be no cause of action for failing to inquire. Second, if a potential transferee makes an inquiry regarding the disease of the prior occupant, "[t]he agent shall not make any disclosure concerning those psychological impacts."<sup>60</sup> Once again, this covers only the agents. The statute is silent as to whether the *owner* must disclose, or at least respond, to the inquiry.

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53. See DEL. CODE ANN. tit. 24, § 2929 (Supp. 1996).

54. *Id.* § 2929(b)(2).

55. See *id.* § 2929(d).

56. See *id.* § 2929(e).

57. See *supra* text accompanying note 50.

58. Subsections 2929(f)-(g) provide:

(f) If a potential transferee makes a specific written request to the owner or agent about the psychological impacts defined above in subsection (b)(1) of this section [homicide, suicide, other felony] regarding a specific property, the owner or agent shall answer the transferee's questions truthfully, to the best of such owner's or agent's knowledge. The agent shall have no duty to inquire about the psychological impacts defined above in subsection (b)(1) of this section regarding a specific property unless a transferee, in writing, specifically requests the agent to ask the owner for such information.

(g) The agent shall not make any disclosure concerning those psychological impacts defined above in subsection (b)(2) of this section [AIDS, HIV] even if a buyer specifically asks about such psychological impacts.

DEL. CODE ANN. tit. 24, § 2929(f)-(g) (Supp. 1996).

59. See *id.*

60. *Id.* § 2929(g).

### 6. District of Columbia

The District of Columbia statute covering real estate and business chance licenses contains a typical psychological impact provision.<sup>61</sup> Section 45-1936(f)(1) states facts that do not need to be disclosed in a real estate transaction despite the fact that they may constitute a psychological impact.<sup>62</sup> The District of Columbia provides protection when property might be impacted by an occupant with AIDS, HIV, or any other disease that is not transmitted through common occupancy, and property that has been the site of a homicide, any other felony, or a suicide.<sup>63</sup> Section 45-1936(f)(2) prohibits causes of action against various agents and owners for failure to disclose psychological impacts mentioned in the statute.<sup>64</sup>

### 7. Florida

Florida has a very limited psychological impact statute.<sup>65</sup> Only the AIDS or HIV status of the prior occupant is made a nonmaterial fact that does not have to be disclosed in a real estate transaction. Causes of action are also prohibited against owners, transferors' agents, and transferees' agents for failing to disclose these two psychological impacts. The statute extends neither to other diseases that, like AIDS and HIV virus, are not transmitted through common occupancy, nor to crime/death-type psychological impacts such as homicides, other felonies, or suicide.

### 8. Georgia

Georgia's psychological impact statute prohibits causes of action against owners and owners' agents for failing to disclose psychological impacts covered in the subsections of the statute.<sup>66</sup> The statute lacks the typical provision that redun-

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61. The District of Columbia statute provides:

(f)(1) Notwithstanding the possibility that a fact may have a psychological impact on a purchaser, lessee, or sublessee, it shall not be a material fact that must be disclosed in a real estate transaction that:

(A) An occupant of real property, at any time, was infected or was or is suspected to have been infected with a human immune deficiency virus;

(B) An occupant of real property, at any time, has been diagnosed, was infected, or was suspected to have been diagnosed as having acquired immune deficiency syndrome or any other disease that has been determined by medical evidence to be highly unlikely to be transmitted through occupancy of property alone; or

(C) The property, at any time, has been or was suspected to have been the site of a suicide, homicide, or other felony.

(2) A cause of action shall not arise against an owner of real property, a real estate broker, a real estate salesperson, a property manager, a lessee, or sublessee for the failure to disclose to the purchaser, lessee, or sublessee that the real property was the site of any circumstances described in paragraph (1) of this subsection.

D.C. CODE ANN. § 45-1936(f) (1996).

62. *See id.* § 45-1936(f)(1).

63. *See id.*

64. *See id.* § 45-1936(f)(2).

65. *See* FLA. STAT. ANN. ch. 689.25 (1995).

66. *See* GA. CODE ANN. § 44-1-16 (1996).

dantly declares such circumstances nonmaterial facts whose disclosure is not required. Subsection 44-1-16(1) covers disease-type psychological impacts. It does not specifically mention HIV or AIDS, but they are logically included in the statutory circumstance of any prior occupant "infected with a virus or any other disease which has been determined by medical evidence as being highly unlikely to be transmitted through the occupancy of a dwelling place."<sup>67</sup> In addition, subsection 44-1-16(2) lists the typical crime/death-type psychological impacts, i.e., homicide or other felony and suicide.<sup>68</sup> However, the statute specifies that an owner or owner's agent cannot make an intentional misrepresentation of fact regarding the history of the property. In Georgia, an owner or agent must "answer truthfully" in response to a question concerning psychological impacts even though their nondisclosure is protected by Georgia law.<sup>69</sup> The seller does have the option to remain silent in response to such a question from the prospective buyer, but it seems to be a meaningless option considering the red flag silence would raise for a buyer concerned enough to ask the question.<sup>70</sup>

### 9. Hawaii

Hawaii has addressed psychological impacts in its statute relating to the revocation of real estate licenses.<sup>71</sup> Under the statute, the Hawaii Real Estate Commission may sanction agents for "[f]ailing to ascertain and disclose all material facts" related to a property.<sup>72</sup> However, the statute excepts the AIDS, AIDS-related complex, or HIV status of a prior occupant from what may otherwise be "material facts."<sup>73</sup> Even though Hawaii law prevents the revocation of a real estate license for failure to disclose disease-type psychological impacts, it does not expressly prevent causes of action against agents and owners for failing to disclose such circumstances.

There is some inconsistency in Hawaii law on this subject. Hawaii law requires sellers to provide buyers a disclosure statement within ten days of the acceptance of an offer.<sup>74</sup> This statute provides that these disease-type impacts *are* "material facts," but they may be excluded from the real estate disclosure statement<sup>75</sup> in contrast to section 20-329cc, the Connecticut real estate licensing law discussed above, that declares disease-type psychological impacts "not material facts."<sup>76</sup> Section 508D-8 also excludes crime/death-type impacts from mandatory disclosure in the statement,<sup>77</sup> except that homicides, felonies, or suicides that occurred on the

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67. *Id.* § 44-1-16(1).

68. *See id.* § 44-1-16(2).

69. *Id.*

70. *See supra* text accompanying note 50.

71. HAW. REV. STAT. § 467-14(18) (1995).

72. *Id.*

73. *Id.*

74. *See* HAW. REV. STAT. § 508D-5 (Supp. 1994).

75. *See id.* § 508D-8.

76. *See supra* notes 48-52 and accompanying text.

77. Section 508D-8 provides:

property within three years of the sale must be included in the disclosure statement.<sup>78</sup>

#### 10. Illinois

Illinois has a brief section relating to psychologically impacted property in its real estate licensing statute.<sup>79</sup> The statute prohibits causes of action against real estate licensees for failing to disclose that a prior occupant was infected with the HIV virus or "that the property was the site of an act or occurrence which had no effect on the physical condition of the property."<sup>80</sup> The section 20-329cc catchall provision clearly includes both disease-type and crime/death-type impacts on the property.

#### 11. Indiana

Indiana's psychologically impacted property statute<sup>81</sup> is the most expansive concerning crime/death-type impacts. In the list of psychological impacts, the statute simply states "an individual died on the property."<sup>82</sup> Thus, homicide, suicide, accidental, and natural death are all included. Section 24-4.6-2.1-2(1) adds the fact the prior occupant died or was afflicted with a disease related to HIV.<sup>83</sup> However, section 24-4.6-2.1-2(3) goes beyond felonies by listing as psychological impacts criminal gang activity, the discharge of a firearm involving the police, and the manufacture or distribution of illegal drugs on the property.<sup>84</sup> This addition is unusual. That these activities occurred on the property may impact the property in a way that is not purely psychological. Criminal activity on the property may

Except as otherwise provided by law the following material facts may be excluded from the statement:

(1) An occupant of the subject property was afflicted with acquired immune deficiency syndrome (AIDS) or AIDS related complex (ARC), or had been tested for human immunodeficiency virus (HIV);

(2) The real property was the site of an act or occurrence that had no effect on the physical structure or the physical environment of the real property, or the improvements located on the real property; or

(3) A homicide, felony, or suicide occurred on the real property more than three years before the date the seller signed the statement.

HAW. REV. STAT. § 508D-8 (Supp. 1994).

78. *See id.*

79. 225 ILL. COMP. STAT. ANN. 455/31.1 (West 1993).

80. *Id.*

81. IND. CODE § 24-4.6-2.1-2 (1996).

82. *Id.* § 24-4.6-2.1-2(2) (Michie 1996).

83. *See id.* § 24-4.6-2.1-2(1).

84. *See id.* § 24-4.6-2.1-2(3). The subsection provides:

(3) That the property was the site of:

(A) A felony under IC 35;

(B) Criminal gang (as defined in IC 35-45-9-1) activity;

(C) The discharge of a firearm involving a law enforcement officer while engaged in the officer's official duties; or

(D) The illegal manufacture or distribution of a controlled substance.

*Id.*

indicate that there is more criminal activity in the area. There are legitimate reasons to know about ongoing gang activity that is located nearby or that drugs were once sold on the property, leading to the legitimate fear that drug buyers will return for another transaction, not realizing the change in ownership. This activity could have a real impact on the future use and enjoyment of the property.

However, an owner or agent has no duty to disclose any of the above psychological impacts to a transferee in Indiana,<sup>85</sup> and the statute protects owners and agents from liability for refusing to disclose psychological impacts.<sup>86</sup> Like many state statutes, the Indiana code reiterates that the owner or transferor cannot intentionally misrepresent a fact concerning a psychologically affected property in response to a direct inquiry from a transferee.<sup>87</sup>

### 12. Kentucky

The Kentucky statute deals only with the AIDS or HIV status of the prior occupant.<sup>88</sup> Section 207.250(1) makes the HIV or AIDS status of the prior occupant not a material fact, so there is no requirement to disclose it.<sup>89</sup> Section 207.250(2) prevents causes of action against owners, owners' agents, and transferees' agents for failure to disclose the HIV or AIDS status of the prior occupant.<sup>90</sup>

### 13. Louisiana

Louisiana has a typical, straightforward psychologically impacted property statute.<sup>91</sup> Section 1468(A) lists "facts or suspicions" that cause property to be psychologically impacted. These include, *but are not limited to*: 1) the fact that an occupant of the property was infected with AIDS, HIV, or any other disease "which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place" and 2) the fact that the property was the site of a homicide or other felony, or a suicide.<sup>92</sup> Section 1468(A) continues, declaring that these impacts are not material facts that must be disclosed.<sup>93</sup> Louisiana's statute also prohibits causes of action against owners and their agents for failure to disclose psychological impacts.<sup>94</sup>

### 14. Maryland

Provisions for psychologically impacted property appear in two separate titles of the Code of Maryland. Virtually identical sections appear under the Real

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85. *See id.* § 24-4.6-2.1-4.

86. *See id.* § 24-4.6-2.1-5.

87. *See id.*

88. *See* KY. REV. STAT. ANN. § 207.250 (Banks-Baldwin 1991).

89. *See id.* § 207.250(1).

90. *See id.* § 207.250(2).

91. LA. REV. STAT. ANN. § 37:1468 (West Supp. 1997).

92. *See id.*

93. *See id.* § 37:1468(A).

94. *See id.* § 1468(B).

Property Code<sup>95</sup> and the Business Occupations and Professions Code.<sup>96</sup> Subsections (a) of both statutes define matters that do not constitute a material fact in real estate transactions.<sup>97</sup> These are the AIDS or HIV status of a prior occupant and the fact that a "homicide, suicide, natural death, or felony occurred on the property."<sup>98</sup> The two sections differ by what type of immunity they expressly provide. Subsection 2-120(b) of the Real Property Code provides sellers, owners, and owners' agents with immunity from civil and criminal liability for failure to disclose psychological impacts listed in the previous subsection.<sup>99</sup> Subsection 17-322.1(b) of the Business Occupations and Professions Code provides brokers and salespersons with immunity from disciplinary action and personal liability for failure to disclose psychological impacts.<sup>100</sup>

### 15. Michigan

Michigan's occupational code protects real estate brokers and salespersons from causes of action for failing to disclose psychological impacts.<sup>101</sup> There are no such protections given to owners/transferrors elsewhere in the Michigan statutes. The statute separates disease-type and death/crime-type impacts in two subsections. Subsection 339.2518(a) covers disease-type impacts by referring to the Fair Housing Act.<sup>102</sup> Michigan is one of only two states to refer to the Fair Housing Act instead of listing disease-type impacts such as AIDS or HIV.<sup>103</sup> Under this subsection real estate agents are protected from causes of action for failing to disclose the handicap of a prior occupant as defined by the Fair Housing Act *and* "disclosure of which would constitute unlawful discrimination under, sections 804,[<sup>104</sup>] 805,[<sup>105</sup>] 806,[<sup>106</sup>] or 818[<sup>107</sup>] . . . of the Act."<sup>108</sup> Subsection 339.2518(b) covers crime/

95. MD. CODE ANN., REAL PROP. § 2-120 (1996).

96. MD. CODE ANN., BUS. OCC. & PROF. § 17-322.1 (Supp. 1996).

97. See MD. CODE ANN., REAL PROP. § 2-120(a) (1996); MD. CODE ANN., BUS. OCC. & PROF. § 17-322.1(a) (Supp. 1996).

98. MD. CODE ANN., REAL PROP. § 2-120(a)(1)-(2) (1996). The language of MD. CODE ANN., BUS. OCC. & PROF. § 17-322.1(a)(1)-(2) (Supp. 1996) is identical.

99. See MD. CODE ANN., REAL PROP. § 2-120(b) (1996).

100. See MD. CODE ANN., BUS. OCC. & PROF. § 17.322.1(b) (Supp. 1996).

101. See MICH. COMP. LAWS § 339.2518 (1996).

102. Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 and 28 U.S.C. §§ 2341-2342 (1994)). The Fair Housing Act defines "handicap" as:

(h) "Handicap" means, with respect to a person —

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

(2) a record of having such an impairment, or

(3) being regarded as having such an impairment,

but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21).

42 U.S.C. § 3602(h) (1994).

103. See MICH. COMP. LAWS § 339.2518(a) (1996). The Wisconsin psychologically impacted property statute also refers to the Fair Housing Act. WIS. STAT. ANN. § 452.23(i) (West. Supp. 1996).

104. 42 U.S.C. § 3604 (1994) ("Sale or Rental of Housing").

105. *Id.* § 3605 ("Residential Real Estate-Related Transactions").

106. *Id.* § 3606 ("Provision of Brokerage Services").

death-type impacts. These are homicide, suicide, or other unlawful acts "which had no material effect on the condition of the real property or improvements."<sup>109</sup>

#### 16. Missouri

Missouri has a typical psychologically impacted property statute.<sup>110</sup> The first subsection states that the fact that a parcel of real property is psychologically impacted is not a material fact that must be disclosed in a real estate transaction.<sup>111</sup> The second subsection defines "psychologically impacted" to include disease-type and crime/death-type psychological impacts.<sup>112</sup> The disease-type impacts are the same ones most prevalent in other states' statutes — HIV, AIDS, and "any other disease which has been determined by medical evidence to be highly unlikely to be transmitted through the occupancy of a dwelling place."<sup>113</sup> The common death/crime-type impacts are found in the second subsection — namely the fact that the property was the site of a homicide or other felony, or a suicide. The third subsection prohibits causes of action against only real estate agents and brokers for failure to disclose psychological impacts.<sup>114</sup> The statute does not mention protection of sellers.

#### 17. Nevada

Nevada's statute concerning psychologically impacted property contains the typical provisions.<sup>115</sup> Subsection 44.770(1) enumerates disease-type and crime/death-type impacts which are not material to real estate transactions.<sup>116</sup> Crime/death-type impacts are homicide, suicide, or death by *any* other cause (or the fact that the property was the site of a felony).<sup>117</sup> Only four other states<sup>118</sup> deem any death on a piece of property a psychological impact. It is particularly noteworthy that Nevada excepts from the psychologically impacted category deaths that occur as a result of a condition of the property.<sup>119</sup> Disease-type impacts include the fact that the property was occupied by a person *exposed* to HIV or AIDS, or any other disease not transmitted through common occupancy.<sup>120</sup>

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107. *Id.* § 3617 ("Interference, Coercion, or Intimidation").

108. MICH. COMP. LAWS § 339.2518(a) (1996).

109. *Id.* § 339.2518(b).

110. MO. REV. STAT. § 442.600 (1996).

111. *See id.* § 442.600(1).

112. *See id.* § 442.600(2).

113. *Id.*

114. *See id.* § 442.600(3).

115. *See* NEV. REV. STAT. § 40.770 (1995).

116. *See id.* § 40.770(1).

117. *See id.* § 40.770(1)(a).

118. California, Indiana, North Carolina, and South Carolina. Texas excepts an accidental death that occurred as a result of a condition on the property. *See* TEX. REV. CIV. STAT. ANN. art. 6573a, § 15E (West Supp. 1997).

119. *See* NEV. REV. STAT. § 40.770(1)(a) (1995).

120. *See id.* § 40.770(1)(b).

Subsection 44.770(2) prevents causes of action against sellers and sellers' agents for failure to disclose psychological impacts. Subsection 44.770(3) similarly provides such protection to buyers' agents unless "otherwise provided in an agreement between a buyer and his agent."<sup>121</sup> Only a sophisticated buyer, or one who sought advice from a real estate lawyer before beginning to work with the broker, would know to get that agreement. It is unlikely that the broker would suggest such an agreement, and it is from the brokers that most buyers get their advice before signing the contract.

### 18. New Hampshire

New Hampshire's statute regarding psychological impact is unique.<sup>122</sup> It addresses only death/crime-type impacts. Disease-type impacts are not included. The statute provides that an owner or owner's agent "shall not be required to disclose . . . [that the] property was a site of a homicide, other felony, or a suicide, *unless* the buyer requests such information of the owner or agent *and* the owner or agent has knowledge . . . ."<sup>123</sup> Thus, buyers in New Hampshire must know to ask the right question if this information would be important to them. In effect, New Hampshire protects sellers and agents from causes of action for failing to disclose death/crime-type psychological impacts.

Interestingly, the statute expressly protects owners and owners' agents from causes of action for disclosing (not failing to disclose) psychological impacts at the request of the buyer.<sup>124</sup> Who would want to sue an owner for *disclosing* such information? One could speculate that the seller might sue an agent who disclosed the information for the lost sale or for breach of a fiduciary duty. Conversely, the agent might sue the seller for loss of a commission caused by the seller's disclosure of these facts to an otherwise ready, willing, and able buyer. However, subsection II of the statute states that sellers and owners are "free to negotiate contractual rights of disclosure."<sup>125</sup> Thus, a seller and the listing agent in New Hampshire could agree to disclose or not.

### 19. New Mexico

New Mexico's psychologically impacted property statutes are, perhaps, the most exact. They list the types of persons protected by the statutes, persons to whom no duty is owed, and types of possible psychological impacts.<sup>126</sup> Section 47-13-2 protects "[a] seller, lessor or landlord of real property, including a participant in an exchange of real property and any agent involved in such a transaction."<sup>127</sup> Under the statute, such persons have no duty to disclose psychological impacts and are not liable for failure to disclose psychological impacts enumerated in the

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121. *Id.* § 40.770(3).

122. *See* N.H. REV. STAT. ANN. § 477:4-e (Supp. 1996).

123. *Id.* (emphasis added).

124. *See id.* § 477:4-e(I)(b).

125. *Id.* § 477:4-e(II).

126. *See* N.M. STAT. ANN. § 47-13-2, -3 (Michie 1995).

127. *Id.*



statute.<sup>128</sup> Psychological impacts under the statute are natural death; the fact that the property was the site of a homicide, suicide, assault, sexual battery, or other felony; or owned or occupied by a person who may have had HIV, AIDS, or any other disease not transmitted by common occupancy.<sup>129</sup> Furthermore, section 47-13-3(A) states that "no cause of action shall arise" against the same persons described in section 47-13-2 for failing to disclose the same psychological impacts described in that section.<sup>130</sup> Additionally, section 47-13-3(B) states that failure to disclose psychological impacts "shall not be grounds for rescission."<sup>131</sup>

## 20. New York

In 1995, the New York Legislature passed its statute protecting transferors of psychologically impacted property and their agents who fail to disclose the fact.<sup>132</sup> Around the time of the law's passage, news stories reported that New York was passing a "haunted house" statute.<sup>133</sup> However, nothing in the statute refers to haunted houses.<sup>134</sup> The law is simply a psychologically impacted property statute that is similar to statutes in other jurisdictions.

The clamor about a proposed "haunted house" statute has its origins in the New York case *Stambovsky v. Ackley*,<sup>135</sup> discussed earlier.<sup>136</sup> The *Stambovsky* court had reasoned that no purpose was served by requiring a buyer to discover undiscoverable impacts that are within the knowledge of the seller.<sup>137</sup> The buyer does have a duty to exercise due care with respect to the transaction. However, the New York court placed the burden on the seller in the case that a circumstance does not affect the physical condition of the property but materially impairs the value of the contract.<sup>138</sup> This reasoning would include all other psychological impacts discussed in this article. Because these conditions do not affect the physical condition of the property, they would not be discoverable by the buyer making a reasonable inspection. Some states,<sup>139</sup> not including New York, have borrowed the language of *Stambovsky* for their psychologically impacted property statutes. They specifically include any "act or occurrence which had no effect on the physical structure of the real property."<sup>140</sup> The New York statute does not include this language.

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128. See *id.*

129. See *id.*

130. *Id.* § 47-13-3(A).

131. *Id.* § 47-13-3(E).

132. See 1995 N.Y. Laws ch. 606, § 1 (codified at N.Y. REAL PROP. LAW § 443-a (McKinney 1996)).

133. See *N.Y. Real Estate Bill Protects Owners From Telling All* (National Public Radio Broadcast, Morning Edition, July 4, 1995), Transcript # 1642-9, available in LEXIS, News Library, CURNWS File.

134. See N.Y. REAL PROP. LAW § 443-a (McKinney 1996).

135. 572 N.Y.S.2d 672 (1991).

136. See *supra* text accompanying notes 5-12.

137. See *Stambovsky*, 572 N.Y.S.2d at 676.

138. See *id.*

139. Hawaii, Illinois, Michigan, Tennessee, Virginia, and Wisconsin.

140. See, e.g., VA. CODE ANN. § 55-524(A)(1) (Michie 1995).

Section 443-a(1)(a) of the New York statute makes the failure to disclose disease-type and crime/death-type impacts not a material defect.<sup>141</sup> Disease-type impacts protected under the statute are the AIDS or HIV status of a prior occupant, or any other disease not transmitted through occupancy of a dwelling.<sup>142</sup> The crime/death-type impacts under the statute are "a homicide, suicide, or other death by accidental or natural causes, or any crime punishable by a felony."<sup>143</sup> Section 443-a(2) prohibits causes of action against owners, occupants, and their agents for failing to disclose psychological impacts.<sup>144</sup> Real estate agents and brokers are also immune from disciplinary action.<sup>145</sup>

Like other states, New York codifies a procedure for buyers to make a written inquiry if psychological impacts are important to their decision to buy.<sup>146</sup> The buyer or buyer's agent must provide the written inquiry to the seller or the seller's agent. The seller may choose whether or not to respond. If the seller chooses to respond, the seller or seller's agent must provide the response to the buyer or the buyer's agent.<sup>147</sup>

### 21. North Carolina

North Carolina has a brief statute pertaining to psychologically impacted property.<sup>148</sup> The statute simply states that the fact that the prior occupant of a property died or was seriously ill is not a material fact in a real estate transaction.<sup>149</sup> The statute clarifies, however, that sellers cannot make a false statement regarding a prior occupant.<sup>150</sup>

### 22. Oklahoma

Oklahoma addresses psychologically impacted property in its real estate license code.<sup>151</sup> Subsection 858-513(A) makes psychological impacts not a material fact that must be disclosed in a real estate transaction.<sup>152</sup> Psychological impacts, under the statute, include *but are not limited to* the fact that the prior occupant had AIDS, HIV, or other disease not transmitted through common occupancy; or that the property was the site of a homicide, other felony, or suicide.<sup>153</sup> Subsection 858-513(B) prohibits causes of action against owners and owners' agents for failure to disclose such impacts.<sup>154</sup>

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141. See N.Y. REAL PROP. LAW § 443-a(1) (McKinney 1996).

142. See *id.* § 443-a(1)(a).

143. *Id.* § 443-a(1)(b).

144. See *id.* § 443-a(2)(a).

145. See *id.* § 443-a(2)(b).

146. See *id.* § 443-a(3).

147. See *id.*

148. N.C. GEN. STAT. § 39-50 (1995).

149. See *id.*

150. See *id.*

151. 59 OKLA. STAT. § 858-513 (1991).

152. See *id.* § 858-513(A).

153. See *id.*

154. See *id.*

If psychological impacts are important to a buyer in Oklahoma, subsection 858-513(C) provides a procedure for making a written request for the information. The provision is very similar to the one provided in Connecticut.<sup>155</sup> A purchaser or lessee may make a written request to the owner's agent. If such a request is made, the owner's agent must ask the owner and report to the buyer, subject to privacy law and with the seller's consent.<sup>156</sup> However, if the owner refuses to disclose the information, the agent must notify the buyer of the seller's refusal to disclose.<sup>157</sup>

### 23. Oregon

Oregon's property statute pertaining to psychologically impacted property is straightforward.<sup>158</sup> Section 93.275(1) declares that psychological impacts outlined in the statute are not material facts and that failure to disclose such will not create a cause of action against an owner or agent.<sup>159</sup> Types of psychological impact protected by the statute include the death of the prior occupant by homicide or suicide, or the fact that the prior occupant had HIV or AIDS.<sup>160</sup> In addition, a person may not disclose that an occupant or owner of the property has or has died from HIV or AIDS<sup>161</sup> under the chapter entitled "Civil Rights; Unlawful Employment Practices."<sup>162</sup>

### 24. Rhode Island

Rhode Island has a typical statute addressing psychologically impacted property.<sup>163</sup> Section 5-20.8-6(a) declares that psychological impacts are not material facts in a real estate transaction.<sup>164</sup> Psychological impacts are defined as including, *but not limited to*, the fact a prior occupant had AIDS, HIV, or other disease not transmitted through common occupancy; or the fact that the property was the site of a homicide or other felony, or suicide.<sup>165</sup> Section 5-20.8-6(b)(1) prohibits causes of action against sellers or their agents for failure to disclose psychological impacts.<sup>166</sup> Section 5-20.8-6(b)(2) clarifies that the protections provided by the statute should not be confused as to permit a misrepresentation of fact or false statement.<sup>167</sup>

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155. CONN. GEN. STAT. § 20-329ee (1996); *see supra* text accompanying note 50.

156. *See* 59 OKLA. STAT. § 858-513(C) (1991).

157. *See id.*

158. *See* OR. REV. STAT. § 93.275 (1995).

159. *See id.* § 93.275(1).

160. *See id.*

161. *See id.* § 659.033 (1995).

162. *Id.* § 659.

163. R.I. GEN. LAWS § 5-20.8-6 (1995).

164. *See id.* § 5-20.8-6(a).

165. *See id.*

166. *See id.* § 5-20.8-6(b)(1).

167. *See id.* § 5-20.8-6(b)(2).

### 25. South Carolina

South Carolina also has a straightforward statute<sup>168</sup> similar to Rhode Island's. Section 40-57-270(A) deems psychological impacts not material facts in a real estate transaction. Under the statute, psychological impacts include the fact or suspicions that the prior occupant died on the property, or that the prior occupant was afflicted with AIDS, HIV, or any other disease not transmitted through common occupancy.<sup>169</sup> Section 40-57-270(B) prevents causes of action against owners and their agents for failure to disclose psychological impacts.<sup>170</sup> Sections 40-57-270(B) and (C) clarify that owners and agents must still disclose the physical condition of the property and may not make any intentional misrepresentations concerning psychological impacts.<sup>171</sup> Thus, sellers and agents cannot use the statute as authority justifying a dishonest response to an inquiry by a buyer or prospective buyer regarding psychological impacts.

### 26. Tennessee

The Tennessee statute<sup>172</sup> broadly defines psychological impacts. Under Section 66-5-207, owners and real estate agents are protected from causes of action for failure to disclose psychological impacts.<sup>173</sup> Psychological impacts under the statute encompass the fact that a prior occupant was afflicted with HIV or other disease highly unlikely to be transmitted through common occupancy, or that the property was the site of: "(1) An act or occurrence which had no effect on the physical structure of the real property, its physical environment or the improvements located thereon; or (2) [a] homicide, felony or suicide."<sup>174</sup>

### 27. Texas

The real estate license law in Texas addresses psychologically impacted property.<sup>175</sup> Psychological impacts protected by the statute are the AIDS or HIV-related illness of the prior occupant, or the fact that a "death occurred on a property by natural causes, suicide, or accident unrelated to the condition of the property."<sup>176</sup> Under the statute, a real estate licensee has no duty to *inquire* about or disclose psychological impacts enumerated in the statute.<sup>177</sup> This may be directed at a broker or salesperson working with a seller, but it is more likely to protect a broker who is working with a buyer, particularly a broker who is an agent of the buyer.

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168. S.C. CODE ANN. § 40-57-270 (Law Co-op. 1993).

169. *See id.* § 40-57-270(A).

170. *See id.* § 40-57-270(B).

171. *See id.* § 40-57-270(B), (C).

172. TENN. CODE ANN. § 66-5-207 (1996).

173. *See id.* § 66-5-207.

174. *Id.*

175. *See* TEX. REV. CIV. STAT. ANN. art. 6573a, § 15E (West Supp. 1997).

176. *Id.* § 15E(2).

177. *See id.* § 15E.

### 28. Utah

Section 57-1-37 of the Utah Code states that: (1) the failure of an owner to disclose that property is stigmatized is not a material fact in a property transaction and (2) owners and their agents are not liable for failing to disclose the fact.<sup>178</sup> "Stigmatized" is defined within this title as encompassing both disease-type and crime/death-type psychological impacts.<sup>179</sup> In Utah, property is "stigmatized" if it may have been the site of a "homicide, other felony, or suicide" or the prior occupant had or was suspected of being infected with HIV or any other disease that has been determined not to be transferred via a dwelling.<sup>180</sup>

### 29. Virginia

Section 55-524(A) of Virginia's Residential Property Disclosure Act<sup>181</sup> is virtually identical to Tennessee's psychologically impacted property statute.<sup>182</sup> Under the statute, owners and real estate agents are immune from causes of action for failing to disclose that an occupant of the property was AIDS or HIV infected. Additionally, no cause of action may arise for the failure to disclose that the property was the site of: "(1) An act or occurrence which had no effect on the physical structure of the real property, its physical environment or the improvements located thereon; or (2) [a] homicide, felony or suicide."<sup>183</sup>

### 30. Wisconsin

Wisconsin's statute<sup>184</sup> relating to disclosures in the sale of real estate affirms that a real estate broker or salesperson "may not disclose" anything that would constitute discrimination under the federal Fair Housing Act.<sup>185</sup> This covers the disease-type impacts discussed in this article. To protect real estate agents from liability for failure to disclose crime/death-type impacts, the Wisconsin statute permits agents to not disclose any occurrences that have "no effect on the physical condition" of a property.<sup>186</sup> Additionally, agents need not disclose the location of an "adult family home" in relation to the property. This is a unique addition and, arguably, unnecessary because a nearby group home does not effect the physical condition of the property.<sup>187</sup>

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178. UTAH CODE ANN. § 57-1-37 (1994).

179. *See id.* § 57-1-1.

180. *See id.* § 57-1-1(4).

181. *See* VA. CODE ANN. § 55-524 (Michie 1995).

182. *See* TENN. CODE ANN. § 66-5-207 (1996); *see also* summary of the Tennessee statute *supra* notes 172-74 and accompanying text.

183. VA. CODE ANN. § 55-524(A) (Michie 1995).

184. WIS. STAT. ANN. § 452.23(1) (West Supp. 1996).

185. Fair Housing Act, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601-3619, 3631; 28 U.S.C. §§ 2341-2342 (1994)). *See* notes 101-09 and accompanying text for a discussion of the Michigan statute which also makes reference to the Fair Housing Act.

186. *See* WIS. STAT. ANN. § 452.23(2)(a) (West Supp. 1996).

187. *See id.* § 452.23(2)(c).

### III. Analysis and a Proposed Solution

Buyers, sellers, and brokers have different needs and desires. Buyers want to find properties that satisfy their needs and desires at the lowest possible price. Sellers want to reach the widest possible group of potential buyers who are ready, willing, and able to buy at the highest price. To satisfy these desires, buyers and sellers both need access to the real estate market. Both buyers and sellers rely on real estate brokers to provide market access through multiple listing systems and their real estate brokers' expertise. Brokers are interested in matching buyers and properties so they can arrange sales and earn commissions. Brokers hope to produce the match quickly and with a minimum of additional expenses, e.g., advertising, to make high profits. If too much time passes without making a match, brokers run the risk of losing clients, whether buyers or sellers, without earning a cent, despite the investment of considerable time, effort, and, sometimes, money. It is for this reason that brokers are so wary of the parties being represented by lawyers whom the brokers consider to be deal breakers. Worse for brokers is the possibility that the parties will later suffer from buyers' or sellers' remorse over the terms of a completed transaction and blame the brokers. Disgruntled buyers and sellers can involve the brokers in costly and embarrassing litigation.<sup>188</sup>

For sellers, the prime cause of unhappiness is too low a price. Sellers of psychologically stigmatized properties fear that their properties will be unmarketable or only marketable at a price substantially below what it would bring without the stigma. They would be angered to learn that their brokers had disclosed the stigma to potential buyers. Brokers are also loathe to reveal the psychological stigma because they share the sellers' fears that it may, at the least, reduce the sales price. If there is no sale, there will be no sales commission. States that have adopted the shield statutes have made a valid policy decision that these sellers' privacy and economic interests deserve protection from the adverse effects of psychological taints. Protecting the nondisclosing seller or broker appears to be the only viable mechanism for achieving that policy short of state compensation for the loss of value.

However, buyers become disgruntled when they discover that the properties they have bought are unsatisfactory or were acquired at too high a price. Buyers go to brokers because, often with good reason, they believe that brokers have real estate expertise. The public has heard that brokers know the market and about real estate. In fact, a good broker, after a thorough interview, can quickly produce a short list of the available properties the buyer is most likely to want and be able to afford. In the process, good brokers provide buyers with a lot of information, e.g., information about school systems, shopping, traffic patterns, quality of life, and neighborhood safety, that puts the property into a realistic context. Frequently, it is this context that makes a property attractive or not. Combined with the property condition disclosures now required by so many states,<sup>189</sup> all this information gives buyers the impression that

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188. See Ronald Benton Brown et al., *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 CREIGHTON L. REV. 25, 45-50 (1995).

189. See *supra* note 3.

they have all the information needed to make the correct decision about which property to make an offer on, and at what price.

Buyers are likely to discover the existence of psychologically stigmatizing events when they meet the neighbors. The buyers may feel cheated out of the chance to decide whether that information made the property unattractive to them or whether that information would affect what they would be willing to pay for that property. Their feelings of anger and betrayal may be transferred to the property, making them dissatisfied with properties otherwise acceptable simply because they feel cheated.

Another factor complicates the situation for buyers. They may reasonably feel that they have become the innocent victims of an unfair practice, i.e., society has shifted the burden of the psychological stigma to them in order to protect the prior owners. They have been stuck with a property that they may no longer want because of their personal beliefs or sensitivities, but it may not be resalable without a loss because of the stigma. After all, reselling it without a loss means selling at a price higher than their purchase price in order to cover the transaction costs. However, if another buyer ignorant of the facts cannot be located, it is unlikely that the property can be resold even for the same price at which it was bought. The fact that sellers and their brokers will not be disclosing the psychologically tainting events does not mean that the information is not known or easily discovered by many otherwise potential buyers.

Furthermore, while quick turn-around sales might seem good for the real estate brokerage industry in the short run because of the production of multiple commissions, they will undermine public confidence in the long run. If brokers cannot be trusted to provide the needed information, then buyers may not use them, seeking to reach the market through other avenues, such as sales by individual owners, nonbroker services, and recent advances in the use of the Internet.

The ill will produced toward brokers will be magnified in states that allow buyers to make inquiries of sellers only when the buyers know that they should ask and do it in the proper way.<sup>190</sup> Buyers would not ordinarily think to make such inquiries unless they knew that the information was not being disclosed in the first place. Even if they suspected that the information was not being disclosed, most would not think to ask unless prodded to do so by the expert on whom they are relying for advice. This puts brokers in a difficult position. Should the brokers warn buyers of events which might psychologically stigmatize property and explain the possibility of asking sellers if such events have occurred?

It seems clear that brokers who are acting as sellers' agents would be breaching their fiduciary duty to the sellers by calling attention even to the possibility that psychologically stigmatizing events might have taken place. Conversely, brokers acting solely as buyers' agents would have a fiduciary duty to deliver that warning. But brokers acting as dual agents or nonagent facilitators are in dangerous and uncharted territory. Moreover, any broker or salesperson who calls attention to the possibility that the prior owner or occupant had AIDS or HIV might be violating the Fair Housing Act just by raising that red flag. Moreover, just raising the possibility

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190. Connecticut, Delaware, New York, and Oklahoma provide for such an inquiry. See their sections in Part II *supra*.

might be misinterpreted by a buyer as a hint that the broker knows of a specific problem with the property.

Some of these problems can be easily remedied in states that require written disclosures about property conditions. A mandatory warning could be added to the property condition disclosure forms describing the way state law deals with psychological stigma. For example, it could include a warning that the seller is not required to disclose certain information that could be considered psychologically stigmatizing and that brokers are prohibited from disclosing that type of information even if they know it. Since the property condition disclosure statement is one that is likely to get close scrutiny by buyers, placing the warning there should effectively eliminate buyers' expectations that all relevant information has been or must be disclosed. Furthermore, in states that allow buyers to inquire, the disclosure statement should explain that process. This remedy will at least level the playing field for the vast majority of potential buyers and will inform buyers that there is some inequality in the information available that their brokers cannot be expected to remedy. It would give all buyers equal warning about the limits of disclosure by sellers and, more importantly, the limits on information that can be provided by brokers.

But warnings would not entirely eliminate buyers' fears that they might get stuck with properties that others know are stigmatized; on the contrary, it might even initially stir up those fears. At least it would establish in buyers' minds that this information will not have to be disclosed in resales and that the information is not being disclosed on any property. Thus, buying stigmatized property is a risk inherent in the purchase of any property, not just the property under consideration. Seeing the warning might encourage buyers to utilize other resources to research possible stigmas, perhaps even giving rise to a whole new, and probably underground,<sup>191</sup> industry of service providers.

The limit to this solution is that not all states require sellers and sellers' brokers to make disclosures about property conditions. For states without such requirements, buyers should be informed in some other way. Requiring brokers to give buyers a written warning about psychologically stigmatized property statutes when making their disclosures about the broker-customer relationship might work, but it is unlikely to be a meaningful disclosure since it will become part of an already overly technical and incomprehensible document that attempts to explain legal concepts to the untrained public.<sup>192</sup> Making the warning a separate disclosure form would not be much better as it would still be part of a series of documents that would tend to overload average buyers who may ignore them as only more legal details. Moreover, this would only work where a broker was involved in the sale. It seems that the best solution would be for those states not yet requiring property condition disclosures to join that trend and, as part of the enactment, include a standard notice that psychologically stigmatizing events will not be disclosed.

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191. It may be necessary for states that are serious about eliminating psychological stigma from the factors involved in the decision to purchase real estate to outlaw purchasing or selling such information.

192. See Brown et al., *supra* note 188, at 72-77.



It is hypothesized that providing a conspicuous written warning with the property condition disclosures would take brokers out of their present awkward situation. It would strengthen the real estate market by eliminating a source of distrust, and it is consistent with the current spirit of consumer protection which is eroding the *caveat emptor* doctrine. It should not cause any impediment to sales of stigmatized properties, at least not in the states that do not provide an inquiry mechanism. In the end, it may also prove to be therapeutic and educational because every party to a real estate transaction would be informed that the state does not think these events are worth being considered by a reasonable person making a real estate purchase.

#### *IV. Conclusion*

The current crop of statutes that protect the nondisclosure of psychologically stigmatizing events produce unintended negative consequences. These results are primarily the product of the public's ignorance of the statutes' existence and, subsequently, brokers being placed in the awkward position of having to decide whether they can or should warn potential buyers about them. Notifying the buying public about these statutes and their effect in the place that is most likely to attract buyers' interest, the property condition disclosure, is a simple but effective solution.

## APPENDIX: Chart of Psychological Stigma Shield Laws

	AL	AK	AZ	AR	CA	CO	CT	DE	DC	FL	GA	HI	ID	IL	IN	IA	KS	KY	LA	ME	MD	MA	MI	MN	MS	MO	
State has statute relating to psychologically impacted property			•		•	•	•	•	•	•	•	•		•	•			•	•		•		•			•	
Broker / agent / owner "not required to disclose"															•												
Makes psychological impacts not a material fact subject to disclosure requirement						•	•	•	•	•		•						•	•		•					•	
Prohibits a cause of action against the following for failing to disclose psychological impacts:																											
transferor/ owner			•		•		•	•	•	•					•				•	•		•					
broker, salesperson, agent (licensee), property manager			•		•	•	•	•	•	•				•	•				•	•		•		•		•	
appraiser								•																			
lessee, sublessee, occupant									•																		
does not specify party / any participant in transaction																											
Prohibits a cause of action against the following for failing to inquire or removes duty to inquire about psychological impacts:																											
transferor/ owner								•																			
broker, salesperson, agent (licensee)								•																			
appraiser								•																			
lessee, sublessee																											
does not specify party																											
Events occurring on the property																											
any death					• <sub>3</sub>										•												
Natural Death			•																		•						
Accidental Death																											
Homicide			•			•	•	•	•		•	• <sub>1</sub>							•		•		•			•	
Suicide			•			•	•	•	•		•	• <sub>1</sub>							•		•		•			•	
Assault																											
Sexual Assault																											
any other felony			•			•	•	•	•		•	• <sub>1</sub>				•			•		•					•	
criminal gang activity																•											
discharge of a firearm involving law enforcement																•											
illegal manufacture or distribution of controlled substances																•											
excepts arson								•																			
any occurrence not affecting the physical condition or environment of the property												• <sub>1</sub>		•										• <sub>2</sub>			
Disease of prior occupant																											
HIV			•		• <sub>4</sub>	•	•	•	•	•		•		•	• <sub>7</sub>				•	•	•					•	
AIDS			•			•		•	•	•		•							•	•		•				•	
Aids Related Complex (ARC)												•															
Any disease that is not known to be transmitted through common occupancy			•			•		•	•		•			•												•	
serious illness																											
handicap as defined by Fair Housing Act																							•				

1. omitted from real estate disclosure statement only - occurring on the property more than three years prior

2. "prohibited by law"

3. that has occurred more than three years prior

4. Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus

5. except a death that results from a condition on the property

6. no cause of action shall arise against an owner or agent for disclosing information upon request

7. a disease related to HIV

	MT	NE	NV	NH	NJ	NM	NY	NC	ND	OH	OK	OR	PA	RI	SC	SD	TN	TX	UT	VT	VA	WA	WV	WI	WY	#	
State has statute relating to psychologically impacted property			•	•		•	•	•			•	•		•	•		•	•	•		•			•		30	
Broker / agent / owner "not required to disclose"																								•		2	
Makes psychological impacts not a material fact subject to disclosure requirement			•					•			•	•		•	•				•							17	
Prohibits a cause of action against the following for failing to disclose psychological impacts:																											
transferor/ owner			•	•		•	•				•	•		•	•		•				•					21	
broker, salesperson, agent (licensee), property manager			•	•		•	•				•	•		•	•		•	•			•					26	
appraiser																										1	
lessee, sublessee, occupant						•	•																			3	
does not specify party / any participant in transaction						•																				1	
Prohibits a cause of action against the following for failing to inquire or removes duty to inquire about psychological impacts:																											
transferor/ owner																				•						2	
broker, salesperson, agent (licensee)																				•	•					3	
appraiser																										1	
lessee, sublessee																										0	
does not specify party																										0	
Events occurring on the property																											
any death			•	%				•							•											5	
Natural Death						•	•												•							5	
Accidental Death						•													•	%						2	
Homicide			•	•		•	•				•	•		•			•		•		•					21	
Suicide			•	•		•	•				•	•		•			•	•	•		•					22	
Assault						•																				1	
Sexual Assault						•																				1	
any other felony			•	•		•	•				•			•			•		•		•					20	
criminal gang activity																										1	
discharge of a firearm involving law enforcement																										1	
illegal manufacture or distribution of controlled substances																										1	
excepts arson																										1	
any occurrence not affecting the physical condition or environment of the property																			•			•			•	6	
Disease of prior occupant																											
HIV			•			•	•				•	•		•	•		•	•	•		•					25	
AIDS			•			•	•				•	•		•	•		•									18	
Aids Related Complex (ARC)																										1	
Any disease that is not known to be transmitted through common occupancy			•			•	•				•			•			•		•							14	
serious illness								•																		1	
handicap as defined by Fair Housing Act																										1	

1. omitted from real estate disclosure statement only - occurring on the property more than three years prior
2. "prohibited by law"
3. this has occurred more than three years prior
4. Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus
5. except a death that results from a condition on the property
6. no cause of action shall arise against an owner or agent for disclosing information upon request
7. a disease related to HIV